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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 273. 29

JOHN H. HARDING, PLAINTIFF IN ERROR,

*vs.*

W. M. WOODCOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED DECEMBER 7, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 18, 1890.

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1 MIDDLE DISTRICT OF TENNESSEE:

At a circuit court of the United States began and held in the Federal court-room, in the city of Nashville, on the third Monday, being the 21st day, of April, in the year of our Lord eighteen hundred and eighty-four, and of the Independence of the United States the 108 year—present, the Honorable D. M. Key, U. S. judge—the following proceedings were had, to wit:

On the 11th day of Jan'y, 1884, a petition was filed in the words and figures following, to wit:

*Petition for Removal.*

To the honl. circuit court of the United States for the middle district of Tennessee, sitting at Nashville:

The petition of W. M. Woodcock respectfully shows and represents unto your honors as follows: That a civil suit for $10,000 for damages has, on the — day of Jan'y, 1884, been commenced against him by John Harding in the State circuit court of Davidson county to recover said amount as damages for an alleged wrongful seizure of property claimed by said Harding for taxes, to wit, an assessment made by the Commissioner of Internal Revenue and placed in the hands of petitioner, who was at the time collector of internal revenue of the 5th collection district of Tennessee.

Petitioner alleges and shows that the said action, to wit, said civil suit brought by said John Harding against him, has been brought against peti-oner, an officer appointed and acting under and by authority of a revenue law of the United States, and that the act done by him and for which he is sued in said action was done by him under the authority of a revenue law of the United States, to wit, the law requiring revenue collectors to collect as-

R. S., § 643. sessments on distillers & others, made by the Commissioner of Internal Revenue. Wherefore he prays that

2 a writ of certiorari, as the statute provides, issue, and that the said cause be removed for trial into the circuit court next to be holden at Nashville, in said district, on the 3d Monday in April, 1884.

HORACE H. HARRISON,
*Sol'r for Petitioner.*

The above-named petitioner makes oath that the matters therein above stated are true to the best of his knowledge, information, and belief.

W. M. WOODCOCK.

Subscribed and sworn to before me Jan'y 11th, 1884.
LEWIS T. BAXTER, *Cl'k.*

I hereby certify that as counsel for the petitioner I have examined the proceedings against him and have carefully enquired into

all the matters set forth in the said petition, and believe them to be true.

HORACE H. HARRISON.

Endorsed: Filed Jan'y 11th, 1884. Lewis T. Baxter, cl'k.

*Certiorari. Issued January 14th*, 1884.

UNITED STATES OF AMERICA,
*Middle District of Tennessee.*

The President of the United States to J. E. Aldrich, clerk of the circuit court of Davidson county, Tennessee, Greeting:

Whereas W. M. Woodcock has presented to this court his petition, which is sworn to, stating that John Harding, on the — day of Jan'y, 1884, began suit against him in said circuit court of Davidson county for $10,000 damages for an alleged wrongful seizure of property claimed by said Harding for taxes, viz., an assessment made by the Commissioner of Internal Revenue and placed in the
3 hands of said Woodcock, who was at that time collector of internal revenue of the 5th collection district of Tennessee:

And whereas said petitioner alleges and shows that said act done by him and for which he is sued was done by him under the authority of a revenue law of the United States, to wit, the law requiring revenue collectors to collect assessments on distillers and others, made by the Commissioner of Internal Revenue:

And whereas said petitioner prays that a writ of certiorari issue as provided by law, and that the said cause be removed for trial into the U. S. circuit court, to be held at Nashville, Tenn., on the 3d Monday of April next for trial:

Now, therefore, these are to command you that you take no further proceedings in said suit in said circuit court for Davidson county, Tenn., but that you send to said U. S. circuit court as aforesaid a complete copy of the proceedings had therein, duly and legally certified, on or before the third Monday of April next, to the end that said suit may be then tried and determined, as the law directs; and this you will in nowise omit, &c.

Witness the Hon'l Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said court
[SEAL.] this the 14th day of January, 1884, and of the Independence of the United States the 109 year.

LEWIS T. BAXTER, *Clk.*

Endorsed: Executed by making known the contents of this
4 writ to J. E. Aldrich, clerk of circuit court of Davidson county, and leaving with him a copy of the same this Feb'y 6th, 1884. G. N. Tillman, U. S. marshal.

*Transcript from State Court.*

Filed June 18, '84.

LEWIS T. BAXTER, *Cl'k.*

STATE OF TENNESSEE:

Pleas at the court-house, in the city of Nashville, county of Davidson, and State aforesaid, on the second Monday, being the fourteenth day, of *day of* January, in the year of our Lord 1884, and in the 108 year of our American Independence.

Present: The Hon'l Frank T. Reid, one of the judges of the circuit courts of the State of Tennessee, and assigned to hold the circuit courts of the eighth judicial district, in said State.

*Summons. Issued 9th Day of January*, 14. *H. C. Hudson, Dep. Cl'k.*

JOHN H. HARDING
*vs.*
W. M. WOODCOCK.

State of Tennessee to the sheriff of Davidson county, Greeting:

You are hereby commanded to summon W. M. Woodcock, if to be found in your county, to appear before the judge of our circuit court, to be held for the county of Davidson, at the court-house, in the town of Nashville, on the 2d Monday in January next, then and there to answer John H. Harding in an action to his damage ($10,000) ten thousand dollars. Herein fail not, and have you then and there this writ.

Witness J. E. Aldrich, clerk of our said court, at office, the 3d Monday in Sept., A. D. 1883.

J. E. ALDRICH, *Clerk,*
By H. C. HUDSON, *D. Cl'k.*

We acknowledge ourselves indebted to W. M. Woodcock,
5 the defendant in the above suit, in the sum of two hundred and fifty dollars, to be void on condition John H. Harding prosecutes his action for damages, this day commenced against said Woodcock in the circuit court of Davidson county, with effect or pay all costs which may at any time be adjudged against him.

Witness our hands and seal- this 9th day of January, 1884.

JOHN H. HARDING,
By S. WATSON, *Att'y.*
H. L. W. CHEATHAM.

Came to hand same day issued, and executed on W. M. Woodcock by reading and making the contents of the within known to him this Jan'y 9th, 1884.

B. H. RAINS, *D. Sheriff.*

Filed Jan'y 12th, 1884.

H. C. HUDSON, *D. Cl'k.*

*Bond for Certiorari.*

In the Circuit Court of Davidson County, Tennessee.

JOHN HARDING
*vs.*
W. M. WOODCOCK.

Know all men by these presents that we, W. M. Woodcock and H. W. Buttorff, are held and firmly bound unto John Harding in the penal sum of two hundred dollars; to the payment whereof we bind ourselves and each of us, and each and every of our several heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 12th day of January, 1884.

The condition of this bond is such that John Harding has commenced his action in the circuit court of Davidson county against said W. M. Woodcock, and said Woodcock has filed his petition, under section 643 of the Revised Statutes of the United States,
6 to remove said cause for trial into the circuit court of the United States for the middle district of Tennessee at the next term, on the 3d Monday in April, 1884: Now, if the said W. M. Woodcock shall enter into the circuit court of the United States on the first day of its next session copies of said process against him and of all pleadings, depositions, testimony, and other proceedings in said cause concerning or affecting the petition, then this bond to be void; otherwise to remain in full force and virtue.

W. M. WOODCOCK.
H. W. BUTTORFF.

STATE OF TENNESSEE,
*Davidson County.*

I, J. E. Aldrich, clerk of the circuit court of said county and State aforesaid, certify the foregoing to be a full, true, and correct transcript of the record in case of John H. Harding *vs.* W. M. Woodcock as the same remain of record and on file in my office.

Witness my hand and seal of office, at office, in Nashville, this 28th day of April, A. D. 1884, and in the 108 year of our Independence.

[SEAL.]

J. E. ALDRICH, *Clerk*,
By H. C. HUDSON, *Dep'y Cl'k.*

Bill of costs, $10.55, correct.

H. C. HUDSON, *D. Cl'k.*

Filed March 20th, 1884.

LEWIS T. BAXTER, *Cl'k*,
By CHAS. NASH, *D. C.*

*Declaration Filed in U. S. Cir. Court.*

Circuit Court of the United States, Middle District of Tennessee.

JOHN H. HARDING
*vs.*
W. M. WOODCOCK.

The plaintiff, John H. Harding, complains of the defendant, W. M. Woodcock, who is in court by summons, &c.—

7 For that heretofore, to wit, on the 3d day of January, 1882, and before and since said day, and also, upon the 2d day of June, 1882, and before and since said day, the plaintiff owned and operated a distillery in the county of Robertson, State of Tennessee, doing business under the name of John H. Harding & Co., and as such distiller executed a bond, with sureties, on the first day of May, 1880, in accordance with the statute in such cases made and provided; that in July, 1881, an assessment was made against the plaintiff for taxes alleged to be due the United States for the sum of four thousand three hundred and thirty-nine $\frac{37}{100}$ (4,339.37) dollars on account of whiskey supposed to have been produced by plaintiff at said distillery; but plaintiff avers that the whiskey upon which said assessment was made was never produced by him, and that he did not owe the United States said sum so assessed as aforesaid nor any part thereof.

That plaintiff appealed to the Commissioner of Internal Revenue in accordance with the statute and with the regulations of the Treasury Department to have said assessment set aside and abated, but said appeal was disallowed by said Commissioner; that said appeal was taken by the plaintiff before the commencement of this suit. Plaintiff further avers that on the 22 day of March, 1882, a suit was begun in the district court of the United States for the middle district of Tennessee against plaintiff and his sureties on his said bond by the United States to recover the amount of said taxes

8 which had been assessed against plaintiff as aforesaid; that the said district court had jurisdiction of the persons and subject-matter of said suit and was competent to render a judgment upon the matters therein pleaded; that on the 24 day of April, 1882, the plaintiff and his codefendants therein filed their several pleas to the declaration in said suit denying that plaintiff was indebted to the United States on account of the taxes assessed against him, as set forth in said declaration; that at the October term, 1883, of said district court said cause of the United States against plaintiff and his codefendants came on to be heard and was heard and tried on its merits before the court and jury, and upon the 14th of November, 1883, of said term verdict and judgment were rendered in favor of the defendants; that the questions involved in said suit were as to the validity of said assessment against plaintiff, as hereinbefore stated, and the effect of said judgment was to declare said assessment illegal and void. Plaintiff further avers that the defendant

was at the date of said assessment the collector of internal revenue for the fifth district of Tennessee, which embraces the county of Robertson; that defendant continued to be such collector until the 1st day of Sept., 1882; that on the said 3 day of Jan'y, 1882, the said defendant, as collector aforesaid, seized and took possession of certain property of the plaintiff, to wit, five hundred and ninety-eight (598) gallons of whiskey at the plaintiff's said distillery, in said county, being of great value, to wit, of the value of five thousand dollars; that said property was seized by the defendant to satisfy the taxes alleged to be due the United
9 States under the said assessment made as hereinbefore stated, being the identical taxes sued for in said suit of the United States against plaintiff and the sureties on his bond, as hereinbefore stated; that the plaintiff protested to the defendant against said seizure on the ground that he did not owe said taxes by reason of the illegality of the said assessment made against him as aforesaid; that, notwithstanding said protest, the defendant took said property out of plaintiff's possession and sold it for the purpose of paying and satisfying the said taxes which had been illegally assessed against plaintiff, as hereinbefore stated, whereby plaintiff was deprived of the use, control, and ownership of said property.

And the plaintiff further avers that on the 2d day of June, 1882, the said defendant, as collector as aforesaid, seized and took possession of certain other property of the plaintiff, to wit, one platform scales, 3 tin cans, 2 wooden tubs, 2 wooden stills, engine and boiler and all the pipes and worms used at plaintiff's distillery, one mill, 234 gallons of corn whiskey, and the distillery premises, containing ten acres, in said county, being of great value, to wit, of the value of five thousand dollars; that said property was seized by the defendant to satisfy the taxes alleged to be due the United States under the said assessment made as hereinbefore stated, being the identical taxes sued for in said suit of the United States against plaintiff and the sureties on his bond, as hereinbefore stated; that the plaintiff protested to the defendant against said seizure on the ground
10 that he did not owe said taxes by reason of the illegality of said assessment made against him as aforesaid; that, notwithstanding said protest, the defendant took said property and sold it for the purpose of paying and satisfying the said taxes which had been illegally assessed against plaintiff, as hereinbefore stated, whereby plaintiff was deprived of the use, control, and ownership of said property, to the great damage of the plaintiff.

II. And also that the defendant, afterwards, to wit, on the 3d day of January, 1882, and at the place aforesaid, other goods and chattels of the said plaintiff, to wit, five hundred and ninety-eight gallons of whiskey, of the value of five thousand dollars, at the place aforesaid found, did take and carry away and converted to his own use; and afterwards, to wit, on the 2d day of June, 1882, and at the place aforesaid, other goods and chattels of the said plaintiff, to wit, one platform scales, 3 tin cans, 2 wooden tubs, 2 wooden stills, engine and boiler and all the pipes and worms used at plaintiff's distillery, and 234 gallons of corn whiskey, of the value of five

thousand dollars, at the place aforesaid found, did take and carry away and converted to his own use, and other wrongs to the plaintiff then and there did, to the great damage of the plaintiff.

III. And also that the defendant, afterwards, to wit, on the 2d day of June, 1882, and at the place aforesaid, with force and arms, broke and entered the close of the plaintiff—that is to say, a certain tract of ten acres, on which was situated the said distillery of the plaintiff—and with his feet, in walking, trod down, trampled upon, consumed, and spoiled the grass and herbage of the plaintiff
11 then and there growing and being of great value, to wit, of the value of five thousand dollars, & other wrongs to the plaintiff then and there did, and to the plaintiff's damage ten thousand dollars, and therefore he brings this suit.

S. WATSON,
*Att'y for Plaintiff.*

*Pleas in U. S. Cir. Court.*

Filed June 7th, 1884.

LEWIS T. BAXTER, *Clk*,
By CHAS. NASH, *D. Clk.*

In the Circuit Court of the United States for the Middle District of Tennessee.

JOHN H. HARDING
*vs.*
WM. M. WOODCOCK.

Comes the defendant, by attorney, and for plea to the plaintiff's declaration says—

That the plaintiff his action aforesaid ought not to have and maintain against this defendant, because he says that he is not guilty of the wrong and injuries complained of in manner and form as the plaintiff in declaring has alleged, and of this he puts himself upon the country.

2d. And for a further plea in this behalf to first two counts of said declaration the defendant says that the plaintiff ought not to have and maintain the causes of action therein mentioned, because he says that the plaintiff secretly and covertly, through another person, bid off and purchased the said articles of property at the sale mentioned therein and paid nothing therefor, and has never been deprived of the possession and ownership thereof and has not in any way been damaged by any act of this defendant, and this defendant is ready to verify.

3d. And for a further plea to the third count of said declara-
12 ration the defendant says that the plaintiff ought not to have and maintain the cause of action therein mentioned, because he says that plaintiff's distillery used by him for the manufacture of distilled spirits was situated on the premises therein described,

and the defendant, being collector of the 5th collection district of Tennessee, had the right as such collector to enter upon said premises in approaching said distillery, the same being situated within said collection district, and the defendant did not with his foot, in walking, tread down, trample upon, and consume or spoil more of plaintiff's grass or other vegetation there situated than was necessary in making ingress and egress to and from said distillery, and this he is ready to verify.

A. McCLAIN, *U. S. Att'y.*

4th. And for a further plea to the plaintiff's declaration the defendant says that the plaintiff ought not to have and maintain his action aforesaid, because he says that acts complained of were done by him as collector of the 5th collection district of Tennessee in the enforcement of an assessment chargeable against the plaintiff, duly made by the Commissioner of Internal Revenue and certified to him, the defendant, by said Commissioner with an order directing its collection, and this he is ready to verify.

5th. And for a further plea in this behalf the defendant says that the plaintiff his action aforesaid ought not to have and maintain, because he says that heretofore, defendant being collector of the 5th collection district of Tennessee and the plaintiff being a distiller in said collection district, a seizure was made by the defendant
13 of the *of the* property mentioned in the plaintiff's declaration for violation of the internal-revenue laws of the United States by the plaintiff; and thereafter an action was commenced by the United States, in the district court of the United States for the middle district of Tennessee, to have condemnation of said property as forfeited to the United States on account of said violations, and in said suit, which was dismissed by the United States, it was ordered by said court that certificate that there was probable cause of seizure be entered of record, which was done, and this defendant is ready to verify.

A. McCLAIN, *U. S. Att'y.*

*Replication in U. S. Cir. Court.*

Filed Nov. 25, 1884.

LEWIS T. BAXTER, *Cl'k,*
By CHAS. NASH, *D. C.*

Circuit Court of the United States for the Middle District of Tennessee.

JOHN H. HARDING
*vs.*
W. M. WOODCOCK.

1. The plaintiff, for replication to the defendant's first plea, in which he hath put himself upon the country, says that he doth the like.

2. For replication to the defendant's second plea the plaintiff de-

nies that the matters therein alleged are true, and of this he puts himself upon the country.

3. For replication to the defendant's third plea the plaintiff denies that the defendant entered upon plaintiff's close as collector of internal revenue, but says that defendant entered upon said close in his own wrong, as set out in plaintiff's said declaration, and of this plaintiff puts himself upon the country.

14 4. For replication to the defendant's fourth plea the plaintiff says that the assessment mentioned in said plea was illegal and void, for that heretofore, to wit, on the 22 day of March, 1882, a suit was begun in the U. S. district court for the middle district of Tennessee by the United States against plaintiff to recover the amount of taxes claimed to be due by virtue of said assessment; that said suit was begun at the special instance and request of defendant as collector of internal revenue; that the said district court had jurisdiction of the persons and subject-matter of said suit and was competent to render judgment therein; that issues were made by the filing of proper pleas and the direct question to the court as to the validity and legality of said assessment; that at the Oct. term, 1883, of said court the said cause was tried upon its merits before the court and jury, and on the 14th day of November, 1883, of said term verdict and judgment were rendered for said defendant, the plaintiff herein; that the effect of said judgment was to declare said assessment illegal and void, and, further, that before the commencement of said suit the plaintiff appealed to the Commissioner of Internal Revenue, in accordance with the statute and the rules of the Treasury Department, to have said assessment abated and set aside, but said appeal was disallowed by said Commissioner, and this plaintiff is ready to verify.

5. For replication to the defendant's fifth plea the plaintiff says that the seizure therein alleged was not the same seizure complained of in plaintiff's declaration, but was other and different; that

15 the seizure alleged in said plea was made on the — day of October, 1880, and the said action for condemnation began on the 15th day of October, 1880; that the said several seizures complained of in plaintiff's declaration were made after the release and restitution of the property by order of the court, and that no action for condemnation of the property seized, as complained of in plaintiff's declaration, has ever been brought; that the seizures complained of in plaintiff's declaration were made by defendant for the purpose of enforcing the collection of taxes alleged to be due under said illegal assessment, and not for a violation of the internal-revenue law, and this the plaintiff is ready to verify.

S. WATSON,
*Att'y for Plaintiff.*

*Demurrer in U. S. Cir. Court.*

Filed Nov. 25, 1884.

LEWIS T. BAXTER, *Cl'k*,
By CHAS. NASH, *D. C.*

JOHN H. HARDING
*vs.*
WM. M. WOODCOCK.

The defendant demurs to the plaintiff's replication to the defendant's fourth plea, and for cause of demurrer says:

1. That said replication fails to state and specify any issue of fact or of law that was tried and determined in the suit referred to which raised any question of illegality or invalidity of the said assessment referred to in said replication, but states as a conclusion of law and as a sequence or deduction from the result of said litigation that said assessment was illegal and void where the same results alleged to have taken place in said suit might occur without calling
16 in question the validity or legality of said assessment.

2d. The replication not only fails to show that the defendant was a party to the suit referred to, but, on the contrary, shows that he was not a party to said suit and hence was not by the results of said suit, even if it had been determined in said suit that said assessment was illegal and invalid.

A. McCLAIN, *U. S. Att'y.*

*Rejoinder in U. S. Cir. Court.*

Filed Nov. 25, 1884.

LEWIS T. BAXTER, *Clk,*
By CHAS. NASH, *D. C.*

Circuit Court of the United States for the Middle District of Tennessee.

JOHN H. HARDING
*vs.*
W. M. WOODCOCK.

The defendant, for rejoinder to the plaintiff's replication to defendant's fifth plea, says that the said seizure, made on the — day of October, 1880, referred to in said replication, was made by the defendant as collector of the 5th collection district of Tennessee for violation of the internal-revenue laws of the United States by the plaintiff, and embraced all the property sold by the defendant mentioned in the plaintiff's declaration, and after said seizure of the — day of October, 1880, said property then seized and thereafter sold by the defendant as collector as aforesaid was never restored to the plaintiff by order of said district court or otherwise before the said sales complained of in the plaintiff's declaration, but the taxes due the United States on the whiskey mentioned in the plaintiff's declaration and sold by the defendant as collector as aforesaid had
17 never been paid before said sales of the same, and said whiskey at the time of said sales was rightfully in the care and custody of the defendant as collector as aforesaid, subject to the lien of the United States for said taxes, and all of said property so seized on the

— day of Oct., 1880, and sold as aforesaid was all embraced in the said suit in the district court seeking condemnation of the same as forfeited to the United States for and on account of said violations and is a part of the property referred to in the said certificate of reasonable cause of seizure entered of record in said suit in the district court, and the same violations of the internal-revenue laws for which said seizure of the — day of October, 1880, was made was also the ground on which said assessment was made, and this the defendant is ready to verify.

A. McCLAIN,
*U. S. Dist. Att'y.*

*Demurrer.*

U. S. Cir. Court.
Filed Nov. 25th, 1884.

LEWIS T. BAXTER, *Cl'k*,
By CHAS. NASH, *D. C.*

*Demurrer to the Defendant's Rejoinder to Plaintiff's Fifth Replication.*

Circuit Court of the United States for the Middle District of Tennessee.

The plaintiff for demurrer to said rejoinder says:

1. The allegation that the whiskey had never been restored to plaintiff by an order of the district court in the condemnation proceedings presents an immaterial issue not in any way effecting the rights of the parties to this suit.

2. The allegation that the "same violation of the internal-revenue law for which said seizure of the — day of October, 1880, was
18 made was also the ground on which said assessment was made" cannot give the defendant the protection of the entry of the certificate of probable cause made by the district court in the condemnation proceedings.

S. WATSON,
*Att'y for Plaintiff.*

*Transcript from Dist. Court U. S.*

Filed Nov. 26th, 1884.

LEWIS T. BAXTER, *Cl'k.*

UNITED STATES OF AMERICA:

At a district court of the United States begun and held in the Federal court-room, at the custom-house, at Nashville, in and for the middle district of Tennessee, on the third Monday, being the 15th day, of October, 1883—present, the Honl. David M. Key, judge—the following proceedings were had, to wit:

Declaration filed 22d March, 1883, as follows:

The District Court of the United States for the Middle District of Tennessee. April Term, A. D. 1882.

UNITED STATES
*vs.* } 675.
JOHN H. HARDING *et al.*

The United States of America, by A. McClain, Esq., attorney of the said United States for said district, complains of John H. Harding, Benj. F. Hurt, and Asa Hopkins, citizens of the said State of Tennessee, defendants, who are in court by summons to answer the plaintiffs of a plea that they render unto the said plaintiffs the sum of three thousand two hundred dollars, which they owe to the plaintiffs and from them unjustly detain; for that whereas heretofore, to wit, on the 9th day of April, A. D. 1880, at the district aforesaid, the said defendants, by their certain — obligatory, sealed with their seals and now here to the court shown, the said John H. Harding, as
19 principal, and the said Benjamin F. Hurt and Asa Hopkins, as sureties, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the full and just sum of three thousand two hundred dollars, above demanded; to the payment whereof, well and truly to be made, they jointly and severally bound themselves, their heirs, executors, and administrators, firmly by said presents; the condition of which said writing obligatory was such that if the said John H. Harding, who intended, on and after the 9th day of April, 1880, to be engaged in the business of a distiller within the 5th collection district of the State of Tennessee, to wit, in the county of Robertson and State aforesaid, should in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers and should pay all penalties incurred and fines imposed on him for a violation of any of the said provisions, and should not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distillery apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he should carry on the said business, then this obligation to be void; otherwise it should remain in full force; yet the said John H. Harding did not in all respects faithfully comply with all of said provisions of law in relation to the duties and business of distillers, but failed to do so, in this, that he failed to pay the plaintiffs four thousand three hundred and thirty-nine dollars and thirty-seven cents ($4,339.37), balance of taxes which had been duly and legally assessed against him, the said John H. Harding, as distiller as aforesaid, on the July list, 1881.

And the said defendants, although often requested so to
20 do, have not paid the sum of money above *above* demanded or any part thereof to the said plaintiff, but have hitherto wholly neglected and refused and still neglect and refuse, to the damage of the plaintiffs five thousand dollars; and therefore they bring this suit.

ANDREW McCLAIN,
*U. S. Dist. Att'y, Mid. Dist. Tenn.*

Summons is'd March 22d, 1882, as follows:

The President of the United States of America to the marshal of the middle district of Tennessee, Greeting:

Your are hereby commanded to summon John H. Harding, Benj. F. Hurt, and Asa Hopkins, if to be found in your district, to be and appear before the judge of the district court of the United States for the middle district of Tennessee, at the Federal court-room, at Nashville, in said State, on the third Monday in April next, then and there to answer the United States of America of a plea that they render unto the plaintiffs the sum of three thousand two hundred dollars, which they owe to and from the plaintiffs detain, to the plaintiffs' damage five thousand dollars ($5,000.00). Herein fail not, and have then and there this writ.

Witness the Honl. David M. Key, judge of the district court of the United States, this the 22 day of March, in the year of our Lord 1882, and of the Independence of the United States the 106 year.

E. R. CAMPBELL, *Clk.*

Endorsed: Came to hand day issued, and executed on John H. Harding, B. F. Hurt, and Asa Hopkins by making known to each of them the contents hereof and delivering to each of them a copy of the declaration. April 10th, 1882. W. T. Wright, deputy marshal.

21 *Distiller's Bond.*

Know all men by these presents that we, John H. Harding, of Robertson county, Tennessee, as principal, and Benjamin F. Hurt and Asa Hopkins, both of Robertson county, Tennessee, as sureties, are held and firmly bound unto the United States of America in the full and just sum of ($3,200) thirty-two hundred dollars, money of the United States; to which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 9th day of April, A. D. 1880.

The condition of the foregoing obligation is such that whereas the said John H. Harding now or intends on and after the first day of May, 1880, to be engaged in the business of a distiller within the 5th collection district of the State of Tennessee, to wit, at distillery No. 7, situated in the 5th civil dist., 3 miles N. W. of Barren Plains, county of Robertson and State aforesaid: Now, therefore, if the said John H. Harding shall in all respects faithfully comply with all the provisions of law in relation to the duties and business of distillers and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands or any part thereof or any of the distillery apparatus to be encumbered by mortgage, judgment, or other lien during the time in which he shall carry on

said business, then this obligation shall be void; otherwise it shall remain in full force.

JOHN H. HARDING. [SEAL.]
BENJAMIN F. HURT. [SEAL.]
ASA HOPKINS. [SEAL.]

Signed, sealed, and delivered in presence of—
R. F. PATTON.
W. R. HOOPER.

22 On the back of the bond is the following endorsement, to wit: I hereby certify that this bond is properly filled up and executed, and that the sureties thereon are in my belief sufficient, and I approve the same this 1st day of May, 1880.

W. M. WOODCOCK,
*5th District of Tennessee.*

Pleas filed April 24th, 1882, in words and figures as follows:

District Court of the United States, Middle District of Tennessee.

UNITED STATES
*vs.*
JOHN H. HARDING, as Principal, and BENJ. F. HURT and ASA HOPKINS, as Sureties.

And the said defendants, by J. E. Garner and Joseph R. Dillin, their attorney-, comes and defends the wrong and injury, when, &c., and say that the said plaintiff ought not to have or maintain his aforesaid action against them, the said defendants, because they say they do not owe the said plaintiff the amount declared for or any other amount, and of this they put themselves upon the country.

2. For they say that the said John H. Harding has in all respects faithfully complied with all the provisions of law in relation to the business of distillers during the time he carried on the business of a distiller, and of this they put themselves upon the country.

3. For they say that defendant, John H. Harding, was indicted in the circuit court of the United States for the middle district of Tennessee on the — day of ——, 1880, charged with the illegal removal of distilled spirits to a place other than a distillery

23 warehouse provided by law, and on the 24 day of Oct., 1881, defendant was arraigned and pleaded not guilty, and was placed upon his trial, and on the 25th day of Oct., 1881, a jury of good and lawful men, sworn to try the issue, rendered a verdict of not guilty; and, further, that the illegal removal charged in that case is the precise offense, at the same place, same plaintiff, same defendant, and for the same act charged for which a recovery is sought in this case; and this the said defendants are ready to verify by the said records. Wherefore they pray judgment if the said plaintiff ought to have or maintain the aforesaid action thereof against them or either of them, &c.

4. For defendants say that the said Jno H. Harding has violated

no law by which the said Harding or either of said defendants are in any way liable to the United States for any amount.

5. For they say that they are not guilty in manner and form as plaintiff hath alleged, and of this they put themselves upon the country.

J. E. GARNER,
JOS. R. DILLIN, *For Def'ts.*

MIDDLE DISTRICT OF TENNESSEE:

Personally appeared before me, E. R. Campbell, clerk of the district court of the U. S. for the said district, the affiant, John H. Harding, who makes oath that the statements made in the foregoing pleas as of his own knowledge are true, and that those stated on information of others he believes to be true.

J. H. HARDING.

Subscribed & sworn to before me this April 24th, 1882.
E. R. CAMPBELL, *Cl'k.*

24 Jury empannelled, &c., on Nov. 13th, 1883, in words and figures following:

THE UNITED STATES
*vs.*
JOHN H. HARDING, BENJ. F. HURT, and ASA HOPKINS. } 675.

Came the attorney of the United States and the defendants, by their attorneys, and came also a jury of good and lawful men, to wit: John W. Gant, J. T. W. Jestice, E. E. Erwin, J. O. Dillard, J. M. Gleaves, Jacob Binkley, Rob't Finnegan, C. D. White, J. C. Cooper, F. Wigfall, Jr., B. F. Carter, and G. W. Randolph, who, being elected, tried, and sworn well and truly to try the issues joined, after hearing a portion of the evidence, were respited until to-morrow morning at 9 o'clock.

Judgment rendered Nov. 14th, 1883, in words and figures following, to wit:

UNITED STATES
*vs.*
JOHN H. HARDING, BENJ. F. HURT, and ASA HOPKINS. } 675.

Came the parties, by their attorneys, and came again also the jury empannelled in this cause on yesterday, who, after hearing the conclusion of the evidence and the charge of the court, upon their oaths do say that they find the issues in favor of the defendants.

It is thereupon considered by the court that this cause be dismissed, and that the defendants go hence without day.

MIDDLE DISTRICT OF TENNESSEE:

I, E. R. Campbell, clerk of the district court of the United States

for said district, do hereby certify that the foregoing is a true,
25 perfect, and complete transcript of the records and proceedings had in said court in the cause lately determined therein, wherein the United States were plaintiffs and John H. Harding *et al.* were defendants, as the same remains of record in my office.

Witness my hand and the seal of said court this 22 day of November, 1884.

E. R. CAMPBELL, *Clerk.*

26 On Feb'y 9th, 1885, bill of exceptions was filed in words and figures as follows, to wit:

*Bill of Exceptions.*

JOHN H. HARDING
*vs.*
W. M. WOODCOCK. } 2660.

On the trial of this cause, on the — day of ——, 1884, the plaintiff offered the following evidence:

JOHN H. HARDING testified that he was the plaintiff in this cause; that he was the owner of the distillery and other property mentioned in his declaration on and before the 3 day of January, 1882, and before and since said date, and also upon the 2d day of June, and before and since said date; that he operated said distillery in the county of Robertson, State of Tenn., doing business under the name of John H. Harding & Co.; that as such distiller he executed bond, with sureties, on the first day of July, 1880, in accordance with the statute; that in July, 1881, an assessment was made against the plaintiff for taxes alleged to be due United States for the sum of four thousand three hundred and thirty-nine $\frac{37}{100}$ dollars, on account of whiskey supposed to have been produced by him, the said distiller, at said distillery; that he appealed to the Commissioner of Internal Revenue, in accordance with the statute and with the regulations of the Treasury Department, to have said assessment set aside and abated, but said appeal was disallowed by the Commissioner; that said appeal was prayed and taken by him and disallowed by the Commissioner before the commencement of this suit.

The plaintiffs here introduced as evidence properly certified copies of said assessment, his appeal therefrom, and the action of
27 the Commissioner disallowing said appeal, which were read to the jury.

The said Harding then further testified that on the 22d day of March, 1882, a suit was begun in the district court of the United States for the middle district of Tennessee by the United States against him and his sureties on his distiller's bond to recover the amount of taxes which had been assessed against him, as stated above.

The plaintiff here introduced as evidence a properly certified copy

of the record of said suit upon his bond aforesaid (pp. 18, 19, 20, 21, 22, 23, 24, 25 of this record).

Said Harding further testified that he was the defendant in said suit; that the taxes sued for in said suit were the same taxes which had been assessed, as stated above, and to collect which the defendant made the seizure complained of in the declaration; that the defendant was at the time of said assessment collector of internal revenue for the 5th district of Tennessee, which embraces the county of Robertson, and continued to be such collector to the 1st day of September, 1882; that on the 3 day of Jan'y, 1882, the defendant, as such collector, seized and took possession of five hundred and ninety-eight gallons of whiskey belonging to witness, at said distillery, and afterwards, to wit, on the 16th day of Jan'y, 1882, sold the same for the sum of ($32.70) thirty-two $\frac{70}{100}$ dollars.

And on the 2d day of June, 1882, the defendant, as collector, seized and took possession of certain other property of the plaintiff, to wit, one platform scales, three tin cans, two wooden tubs, two wooden stills, engine, and boiler, all the pipes and worms used at
28 witness' said distillery, one mill, two hundred & thirty-four gallons of corn whiskey, and the distillery premises, containing ten acres, and sold all of said property for the sum of seventy-six and $\frac{70}{100}$ dollars.

The witness, the plaintiff, here introduced the warrants for seizure and the sale thereunder, as above stated. He further testified that said property was seized by the defendant to satisfy the taxes alleged to be due the United States under the assessment made as hereinbefore stated, being the identical taxes sued for in said suit of the United States against him and his sureties on his bond, as hereinbefore stated.

Proof was introduced by the plaintiff tending to show that the property seized and sold, as hereinbefore stated, was worth the sum of five thousand dollars. Proof was introduced by the defendant to show that the property was worth from fifteen hundred to five thousand dollars.

Proof was introduced to the effect that the collector delivered the personal property sold to the purchaser and executed and delivered to the purchaser of the distillery premises a deed to the same.

The evidence having been closed, the court thereupon charged the jury that the taxes for which the defendant, as collector, seized and sold the plaintiff's property having been assessed and the assessment certified to the defendant — the collector, the said assessment upon which the collector proceeded and seized and sold the said property was a complete protection to him against the suit of the plaintiff, and instructed the jury to return a verdict in favor
29 of the defendant, which was accordingly done, and judgment entered accordingly.

To this charge the plaintiff then and there excepted, and presented this his bill of exceptions, which was signed by the court, and filed as part of the record.

This Feb'y 9th, 1885.

D. M. KEY,
*U. S. Dist. Judge.*

*Minutes U. S. Cir. Court.*

Entries on minutes.

MONDAY MORNING, *Jan'y 14th*, 1884.

Present and presiding: Honl. D. M. Key, U. S. judge, &c.

JOHN H. HARDING
*vs.*
W. M. WOODCOCK. } 2660.

In this cause the defendant, W. M. Woodcock, presented his petition to the court for the removal of the same from the circuit court of Davidson county, Tennessee, to this court for trial.

Whereupon it is ordered that said petition be filed, and that a certiorari issue to said State court, as the statute of the United States in such cases provides.

And on May 2d, 1884, the following proceedings were had, to wit:

Present and presiding: Honl. D. M. Key, judge, &c.

JOHN H. HARDING
*vs.*
W. M. WOODCOCK. } 2660.

In this cause the defendant appeared and moved the court to strike out of the first count of the declaration all of that part of the first count which refers to a suit of the United States against John H. Harding in the district court, and also to strike out the whole of the first count because it avers separate and distinct causes of action.

Defendant also moved the court to strike out all of the sec-
30 ond count because it alleges two separate and distinct causes of action.

Defendant also moves to strike out the third count because it shows no cause of action, the defendant being a collector of internal revenue according to the averments of the declaration, and the premises entered and alleged to be trespassed upon being the distillery premises of plaintiff; all which motions were severally overruled by the court; to which defendant then and there excepted.

On Nov. 26th, 1884, the following proceedings were had, to wit:

*Minute Entry.*

Present and presiding: Hon. D. M. Key, U. S. judge.

JOHN H. HARDING
*vs.*
W. M. WOODCOCK. } 2660.

Came the defendant and filed his demurrer to the plaintiff's replication to defendant's fourth plea, and the court held that the said plea is not good and sufficient in law, and that the demurrer reached

the said plea, and orders that said plea be stricken out. The defendant filed rejoinder to plaintiff's replication to defendant's fifth plea and the plaintiff filed his demurrer to said rejoinder, and the court holds that said fifth plea is not good and sufficent in law, and that plaintiff's demurrer reaches the said fifth plea, and the court orders that said fifth plea be stricken out; to all which ruling of the court defendant excepts.

And on same day the following proceedings are had:

*Minute Entry.*

JOHN H. HARDING
*vs.*
W. M. WOODCOCK. } 2660.

Came the parties, by their atty's, and came also a jury of
31 good and lawful men, to wit, F. D. Grass, O. C. Covert, S. E. Davidson, D. A. Witt, M. R. Grigsby, T. M. Harmon, Felix Young, Thos. Olsen, John Jackson, F. W. Horn, R. K. Adams, and John Earthman, who, being elected, tried, and sworn well and truly to try the issues joined, after hearing the evidence and the argument of counsel, were respited until to-morrow morning at 9 o'clock.

And on Nov. 27th, 1884, the following proceedings were had, to wit:

*Minute Entry.*

JOHN H. HARDING
*vs.*
W. M. WOODCOCK. } 2660.

Came again the parties and came again also the jury heretofore empanelled herein, who, after hearing the charge of the court, upon their oaths do say that they find the issues in favor of the defendant. It is therefore considered by the court that the defendant recover of the plaintiff and H. L. W. Cheatham, his security in the prosecution bond, the costs hereof, and that *fi. fa.* issue.

And on Nov. 27th, 1884, the following proceedings were had, to wit:

*Minute Entry.*

JOHN H. HARDING
*vs.*
W. M. WOODCOCK. } 2660.

In this cause it appearing to the satisfaction of the court that the district attorney, Andrew McClain, was, by letter under date of Jan'y 12th, 1884, directed by the Commissioner of Internal Revenue to defend the said defendant in said suit, he being collector of the 5th

collection district of Tennessee at the time of the alleged wrongs charged in said suit to have been committed by him as such collector, and said district attorney having appeared for said de-
32 fendant and represented him in said suit from the time it was removed into this court until the termination of the same in this court, and it appearing to the court that said district attorney should be paid two hundred & fifty dollars ($250.00) for his services aforesaid, it is ordered that that amount be certified as a proper compensation for him in this cause.

On Dec. 29th, 1884, the following preceedings were had, to wit:

*Minute Entry.*

Present and presiding: Honl. D. M. Key, judge, &c.

JOHN H. HARDING
*vs.* } 2260.
W. M. WOODCOCK.

In this cause the plaintiff, by counsel, moved the court for a new trial, and assigned as reason therefor error in charge to the jury, and also moved to have the costs retaxed; which motion for a new trial is continued until the 2d Monday in Feb'y next. The judgment heretofore rendered in favor of defendant is suspended until said motions are heard and determined. The clerk will report whether any of the witness fees taxed against the plaintiff should not be allowed; and, if so, to what extent. He will report what witnesses were summoned by the defendant and not examined, and any other facts material to the determination of the motion to retax the costs. He will report to the 2d Monday of Feb'ry next.

On Feb'y 9th, 1883, the following proceedings were had, to wit:

*Minute Entry.*

Present and presiding: Hon. D. M. Key, judge, &c.

JOHN H. HARDING
*vs.* } 2660.
W. M. WOODCOCK.

The motion heretofore entered to retax the costs in this cause was this day heard upon the report of the clerk filed herein,
33 when the court is of the opinion that the fees of the following witnesses who were summoned but not examined should not be taxed against the plaintiff, viz:

| | | | |
|---|---|---|---|
| W. S. Miller | $9 60 | W. T. Bryan | $5 20 |
| Mark Turner | 1 90 | Wm. Bass | 5 20 |
| P. B. Swift | 4 00 | W. D. Grandstaff | 6 70 |
| Wm. Swift | 4 30 | Thos. Taylor | 1 50 |

And also the costs (deposition) of Wm. Clotworthy, taken but not read in evidence, $1.50; in all, the sum of $39.90.

It is therefore considered by the court that the bill of costs in this case, of $152.70, be reduced by said sum of $39.90, and that the defendant recover of the plaintiff and H. L. W. Cheatham, his security, the sum of $112.80, the costs as retaxed, and that *fi. fa.* issue for the same.

It is also considered by the court that the motion heretofore entered herein for a new trial be overruled. Thereupon the defendant, by attorney, tendered a bill of exceptions in this case, which was signed and sealed and ordered made a part of the record.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the middle district of Tennessee, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John H. Harding and W. M. Woodcock, a manifest error hath happened, to the great damage of the said Harding, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Wash-
35 ington on the 2nd Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court, 9th day of November, 1886.

[Seal Circuit Court U. S., Middle District Tenn.]

LOUIS T. BAXTER,
*Clerk of the Circuit Court for the Middle District of Tennessee.*

[Endorsed:] 2660. John H. Harding *vs.* W. M. Woodcock. Issued Nov. 11th, 1886. Lewis T. Baxter, cl'k, by Chas. Nash, D. C.

36 UNITED STATES OF AMERICA, *ss:*

To W. M. Woodcock, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein John H. Harding is plaintiff

and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 9th day of November, 1886.

D. M. KEY,
*U. S. Dist. Judge.*

I accept service of the above citation this 10th day of November, 1886.

ERNEST PILLOW,
*United States Attorney.*

[Endorsed:] 2660. John H. Harding *v.* W. M. Woodcock. Citation.

37 UNITED STATES OF AMERICA, }
*Middle District of Tennessee.* }

I, Lewis T. Baxter, clerk of the circuit court of the United States for the district aforesaid, do hereby certify that the foregoing is a true, perfect, and complete transcript and copy of the record and proceedings in a certain cause lately in said court pending, wherein John H. Harding was plaintiff and Wm. M. Woodcock was defendant, as fully and completely as the same still remain on file and of record in my office.

Seal Circuit Court U. S., Middle District Tenn.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Nashville, in said district, this 20th day of Nov., 1886.

LEWIS T. BAXTER, *Clk.*

Endorsed on cover: M. Tennessee C. C. U. S. No. 273. John H. Harding, plaintiff in error, *vs.* W. M. Woodcock. Filed December 7, 1886.

Office Supreme Court U. S.
FILED.
OCT 9 1890
JAMES H. MCKENNEY
CLERK

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1890.

# JOHN H. HARDING,

**PLAINTIFF IN ERROR,**

VS.

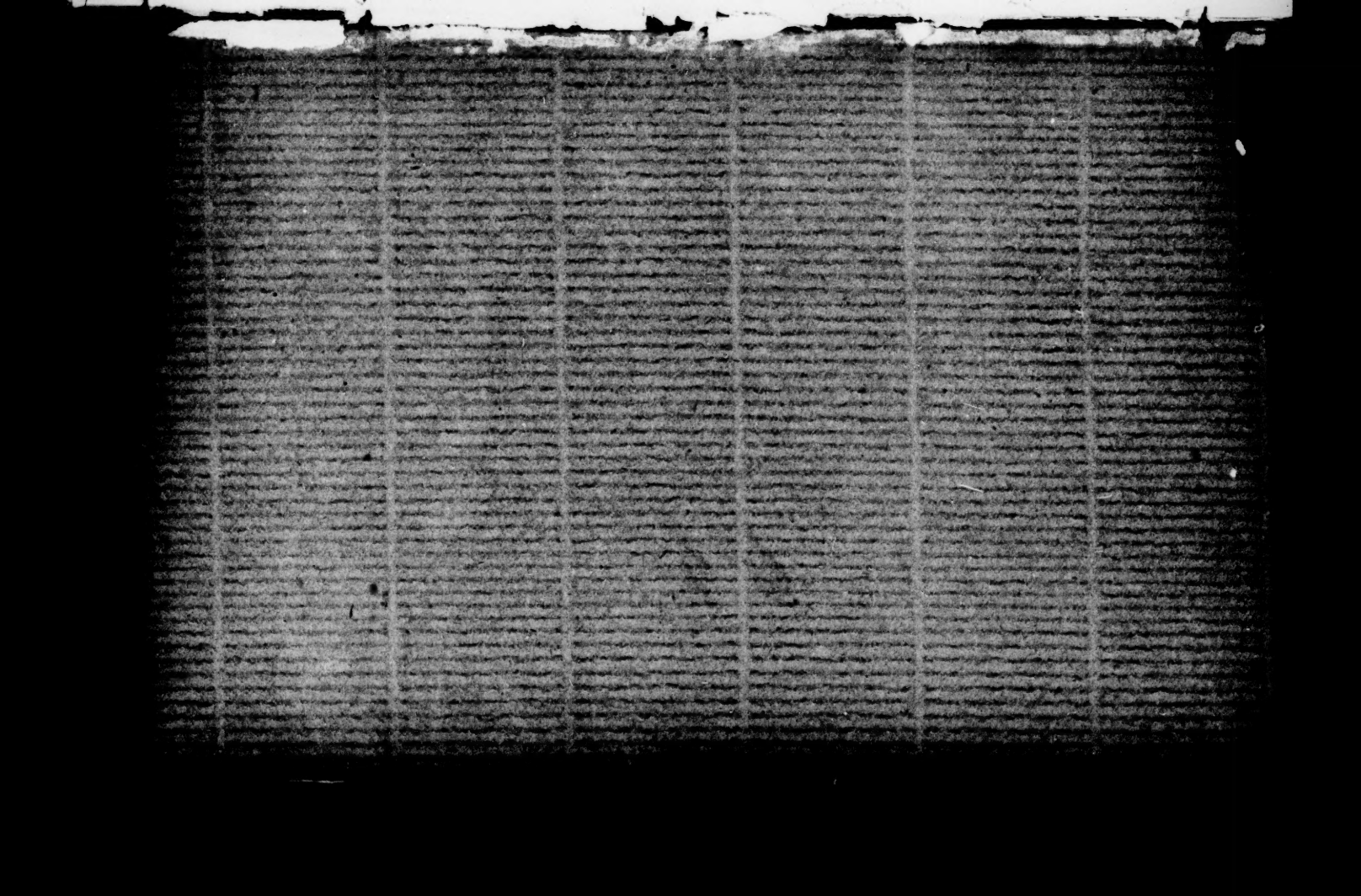
# W. M. WOODCOCK.

**In error to the Circuit Court of the United States for the Middle District of Tennessee.**

## BRIEF FOR PLAINTIFF IN ERROR.

**S. WATSON,**
**G. N. TILLMAN,**
**Attorneys.**

Marshall & Bruce, Stationers and Printers, Nashville, Tenn.



# JOHN H. HARDING,

*PLAINTIFF IN ERROR,*

*vs.*

# W. M. WOODCOCK.

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## STATEMENT OF FACTS.

This suit was begun January 9, 1884, in the State Court, and removed by the defendant to the United States Circuit Court for the Middle District of Tennessee.

The declaration alleges that the plaintiff—plaintiff in error here—owned and operated a distillery in Robertson County, Tennessee; that in July, 1881, an assessment was made against him for taxes to the amount of $4,339.37 on account of whisky supposed to have been made by him; that he appealed to the Commissioner of Internal Revenue to have said assessment set aside and abated, but said appeal was disallowed.

That on March 22, 1882, an action was brought against him in the District Court by the United States on his distiller's bond to recover the amount of said taxes; that on November 14, 1883, verdict

and judgment were rendered in his favor; that the effect of said judgment was to declare said assessment illegal and void.

That on January 3, 1882, the defendant, a collector of internal revenue, seized and sold 598 gallons of plaintiff's whisky to satisfy said taxes alleged to be due the United States.

That on June 2, 1882, the defendant again seized and sold other property of the plaintiff, including his distillery and ten acres of ground upon which it was located, in order to satisfy said taxes; that these seizures and sales were made to collect the identical taxes for which suit had been brought by the United States in the District Court. (*Page* 5.)

The second count alleged the taking of said personal property on said dates, and the conversion thereof by the defendant as an individual.

The third count was for trespass *quare clausum fregit* by the defendant, as an individual, upon plaintiff's said ten acres of ground. (*Page* 6.)

On May 2, 1884, the defendant moved to strike out of the first count all that part which refers to the suit of the United States against John H. Harding in the District Court, and also to strike out the whole count because it avers separate and distinct causes of action; also to strike out the second count because it alleges two separate and

distinct causes of action; also to strike out the third count because it shows no cause of action, the defendant being a collector of internal revenue, and the premises trespassed upon being the distillery premises of plaintiff; all which motions were overruled by the Court. (*Page* 18.)

Thereupon, on June 7, 1884, the defendant filed three pleas:

*First*—To the whole declaration, not guilty.

*Second*—To the first two counts, that the defendant, secretly and covertly, through another person, purchased the articles sold at said sale, and paid nothing for them, and has never been deprived of the possession thereof.

*Third*—To the third count, that defendant, being a collector, had the right to enter upon said premises, etc. (*Page* 7.)

Subsequently defendant filed two additional pleas, viz.:

*Fourth*—To the whole declaration, that defendant did the acts complained of as collector in the enforcement of an assessment chargeable against the plaintiff, duly made by the Commissioner of Internal Revenue, and certified to him, etc.

*Fifth*—To the whole declaration, that heretofore the defendant, as collector, had seized said property for violation of law, and an action was brought

by the United States in the District Court to have condemnation thereof as forfeited, and said suit was dismissed by the United States, and a certificate of probable cause awarded to the defendant. (*Page* 8.)

On November 25, 1884, the plaintiff filed replications, joining issue upon the three first pleas, and to the *fourth* plea replying that said assessment was illegal and void, as determined by the judgment in the suit of the United States against the plaintiff; and, further, that the plaintiff had appealed to the Commissioner, etc. And to the *fifth* plea, that the seizure mentioned therein was not the same seizure complained of in the declaration, but was made on October —, 1880, and the suit for condemnation begun on October 15, 1880, and that the seizures complained of were made after the release and restitution of the property to plaintiff by order of the Court, etc. (*Page* 8.)

On November 25, 1884, the defendant demurred to the replication to the *fourth* plea on the ground: 1. That the replication fails to specify any issue of fact or law in said suit (*U. S.* v. *Harding*) which raised the question of the illegality or invalidity of said assessment, but simply states conclusions of law as to the effect of said suit. 2. The replication fails to show that the defendant was a party to said suit and bound by its judgment, etc. (*Page* 10.)

On the same day the defendant filed his rejoinder

to plaintiff's replication to the *fifth* plea, to the effect that the property seized for forfeiture by the defendant embraced all the property mentioned in the declaration as sold by the defendant, and that said property was never restored to the plaintiff by order of the Court, nor the taxes paid thereon before the said sales; and that the violations of law for which said seizure was made were also the grounds upon which the assessment was made. (*Page* 10.)

To this rejoinder the plaintiff demurred, on the grounds that it presented an immaterial issue, and that the certificate of probable cause in the suit for forfeiture afforded no protection to the defendant in the subsequent seizure. (*Page* 11.)

The Court held that these demurrers reached back to the pleas; that the *fourth* and *fifth* pleas were bad, and ordered them stricken out. (*Page* 18.)

The effect of this judgment was to confine the issues to the questions raised by the declaration, and the first three pleas, and upon these issues the parties went to trial. The facts proved, as stated in the bill of exceptions (*page* 16), were:

Plaintiff's ownership of the property mentioned in the declaration, and the operation by him of said distillery in Robertson County;

The assessment against him of a tax of $4,339.37 in July, 1881, on account of whisky supposed to have been produced;

Plaintiff's appeal to the Commissioner for abatement of the assessment and the disallowance thereof;

The institution against him of the suit by the Government on March 22, 1882, to recover the amount of taxes so assessed, being the same taxes for the collection of which the seizures and sales complained of were made by defendant, as collector.

The record of said suit was introduced in evidence without objection, and is found on page 11 *et seq.*

The declaration therein is based upon the assessment of July, 1881, for $4,339.37.

To this declaration Harding pleaded, in addition to the general pleas, that he had been indicted in the United States Circuit Court on the — day of ——, 1880, for the illegal removal of distilled spirits, and on October 25, 1881, had been acquitted by the jury; and that this alleged illegal removal was the precise offense for which a recovery was sought in the pending case. (*Page* 14.)

On November 14, 1883, judgment was rendered for Harding in that case. (*Page* 15.)

The proof in the bill of exceptions further shows that defendant was revenue collector when the assessment was made, and that, as such, he made the seizures and sales complained of for the purpose of collecting the amount of said assessment;

That the property seized and sold on January 16, 1882, brought $32.70, and that seized and sold on June 2, 1882, brought $76.70;

That the defendant delivered the personal property to the purchaser, and executed and delivered to the purchaser of the distillery premises a deed thereto.

Plaintiff's proof tended to show that the property sold was worth $5,000. Defendant's proof tended to show that said property was worth from $1,500 to $5,000.

No objection was made to any of the evidence introduced.

The Court instructed the jury—

That the taxes for which the defendant, as collector, seized and sold plaintiff's property, having been assessed and the assessment certified to the defendant, the collector, the said assessment upon which the collector proceeded and seized and sold the said property was a complete protection to him against the suit of the plaintiff,

and instructed the jury to return a verdict in favor of the defendant, which was accordingly done, and judgment entered accordingly.

To reverse that judgment the plaintiff has sued out this writ of error.

## ASSIGNMENT OF ERRORS.

1. It was error to instruct the jury that the assessment upon which the collector proceeded and seized and sold the said property was a complete protection to him against the suit of the plaintiff.

2. It was error to instruct the jury to find a verdict for the defendant.

# BRIEF.

*FIRST.*

The plaintiff was entitled to recover a judgment at least for the amount for which the property was sold.

1. This suit is practically an action against the United States, although the collector is the defendant on the record.

> **Revised Statutes, §§ 3220, 3226.**
> **City of Philadelphia v The Collector, 5 Wall., 720**
> **United States v. Frerichs, 124 U. S., 315.**
> **Lovejoy v. Murray, 3 Wall., 1.**

2. The judgment in the suit of the *United States* v. *Harding* is conclusive upon the question of plaintiff's indebtedness upon the assessment. It determined that he did not owe the amount assessed against him.

> **United States v. Choteau, 102 U. S., 603.**
> **United States v. Ulrici, 111 U. S., 38.**
> **Coffey v. United States, 116 U. S., 436**

3. The amounts received by the collector upon the sales of plaintiff's property were, therefore, "wrongfully collected;" and, having appealed to the Commissioner of Internal Revenue in accord-

ance with the statute, the plaintiff is entitled to a judgment for said amounts.

**Stoll v. Pepper, 97 U. S., 436.**

4. Moreover, the judgments of the Court upon the motions to dismiss the declaration and upon the demurrers were conclusive upon the point that said suit of the *United States* v. *Harding* was satisfactory evidence that the plaintiff was not indebted upon the assessment made against him.

*SECOND.*

The plaintiff is entitled to recover the full value of the property seized and sold.

1. The action of the Court in striking out the *fourth* and *fifth* pleas left the defendant without any plea of justification for the seizure.

2. If this action was based on the theory that the plaintiff himself had, in the first count of his declaration, set out the facts required to be pleaded in justification—viz., a seizure by defendant as collector under an assessment duly certified to him—then the result would be a judgment of the Court that the declaration stated a good cause of action, and upon proof of the facts set out therein the plaintiff would be entitled to recover.

3. It is true, as a general proposition, that a ministerial officer, in the execution of a warrant for

taxes based upon a valid assessment, is protected from suit at the instance of the party named in the assessment and warrant.

**Erskine v. Hohnbach, 14 Wall., 613.**

4. The judgment of the Court in the case of the *United States* v. *Harding* in favor of the defendant merged the assessment in the judgment and extinguished it.

5. The institution of said suit by the United States had the effect to withdraw the assessment from the jurisdiction of the Commissioner and collector, and deprive it of all efficacy as a judgment or *quasi* judgment.

**Savings Bank v. The United States, 19 Wall., 227.**
**Clinkenbeard v. United States, 21 Wall., 65.**

6. The defendant knew that this suit was pending, and that he therefore had no right to make the seizure.

**Revised Statutes, Sec 3213.**
**Conner v. Long, 104 U. S, 228.**

7. Under the circumstances the plaintiff was not obliged to pay the tax and then sue the collector. This would have been a useless formality, in view of the fact that the Government was seeking to test in its suit the very question which would have been involved in a suit for recovering back the amount paid..

**Hills v. Exchange Bank, 105 U. S., 319.**

# ARGUMENT.

THE PLAINTIFF IS ENTITLED TO RECOVER A JUDGMENT FOR THE VALUE OF THE PROPERTY SEIZED AND SOLD.

1. The Court held, upon demurrer, that the defendant's *fourth* and *fifth* pleas were not good and sufficient in law, and ordered them stricken out. This left the defendant without any plea of justification. The fourth plea distinctly sets forth the assessment as a justification to defendant for seizing the property. And yet the Court, in its instructions to the jury, given the next day after the order striking out the plea, declared that the assessment was a complete protection to the defendant. If the Court had become convinced that it had erred in ordering the plea stricken out, then it should have ordered a mistrial entered, or else allowed plaintiff to take a verdict and then granted a new trial. The pleas could then have been reinstated.

Or, if the Court, in ordering the pleas stricken out, acted upon the theory that the plaintiff had himself, in his declaration, alleged the matters in justification, of which defendant could have advantage on the trial, then the judgment on the demurrers, which also reached back to the declaration,

and the judgment overruling the motions to strike out the declaration, judicially determined that the declaration was good in law. The plaintiff then having proved the facts alleged in the declaration was entitled to verdict and judgment.

2. But, in any event, the instruction that the assessment was a complete protection to the defendant was error.

This suit is really an action against the United States, although the collector is the defendant of record.

By Section 3220 of the Revised Statutes the Commissioner of Internal Revenue is directed to pay back to collectors all taxes "wrongfully collected," and all "damages and costs" recovered against them in any suit brought against them, by reason of any thing done in the performance of official duty. The Government thus puts itself in the position of a party to a suit who gives to the Sheriff an indemnity bond to induce him to levy an attachment. A judgment in trespass against the Sheriff is conclusive upon the party giving the bond in a suit against him for the same trespass.

**Lovejoy v. Murray, 3 Wall., 1.**

In *City of Philadelphia* v. *The Collector*, 5 Wall., 720, a suit to recover back taxes wrongfully paid, the Court, speaking of the internal revenue acts, says:

Direction in those acts is, without exception, that all such judgments shall be paid by the Commissioner, including, by the latter acts, costs and expenses of suit. Clear implication of the several provisions is that a judgment against the collector in such a case is in the nature of a recovery against the United States, and that the amount recovered is regarded as a proper charge against the revenue collected from that source.

In the *United States* v. *Frerichs*, 124 U. S., 315, plaintiff, in a judgment against a collector, sued the United States in the Court of Claims for the amount of the judgment. The judgment had been rendered in an action for seizure of property by the collector for forfeiture and refusal of a certificate of probable cause. The Court of Claims sustained the suit, and its judgment was affirmed by this Court.

The defendant in the case at bar was represented in the Court below by the United States District Attorney, and is represented in this Court by one of the law officers of the Government.

Whatever, therefore, may have been the legal effect of the suit of the *United States* v. *Harding*, the defendant in this suit is bound by it.

It is true, as a general proposition, that a ministerial officer, in executing a warrant for the collection of taxes based upon a valid assessment, is protected from suit at the instance of the party against whom the assessment is made.

This principle is clearly and forcibly stated in

*Erskine* v. *Hohnbach*, 14 Wall., 613, by Mr. Justice Field—

> That if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution the party aggrieved may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued.

Now, there is no doubt that in the matter of the assessment against the plaintiff there was complete jurisdiction of the subject-matter and of the person; and had the Government elected, through its proper officers, to proceed upon the assessment in its character of a judgment or *quasi* judgment, and to enforce the collection of the tax by a seizure of the property, then the plaintiff would have been without remedy, unless by payment of the tax and bringing suit to recover it back.

But, while the statute authorizes the collection of taxes by warrant of distraint, it also expressly authorizes suit to be brought in the name of the United States against the tax-payer at the instance of the collector with the sanction of the Commissioner of Internal Revenue (*Revised Statutes*, 3213); and this remedy the Government elected to adopt.

It brought suit against the plaintiff upon the assessment, and, during its pendency, the second seizure was made by the defendant. The suit was begun on March 22, 1882, the second seizure was made on June 2, 1882, and final judgment was rendered in Harding's favor on November 14, 1883.

Now, what effect did this election of the Government to sue on the assessment have upon the assessment itself? Did it still continue to have all the force and effect of a judgment? or did it become simply an evidence of a debt due by Harding to the United States?

In a suit brought by the United States upon an assessment, the defendant offered to prove that he did not owe the tax. To this evidence objection was made that the assessment, not having been appealed from, was *res judicata* and conclusive. The Court, through Mr. Justice Bradley, say:

> It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a *quasi* judicial character, and cannot be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal, and cannot form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. *When the Government elects to resort to the aid of the courts it must abide by the legality of the tax.* When it follows the statute, its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs.

21 Wall 63

When the Government, therefore, elected to sue upon the assessment, it elected to treat it simply as an evidence of debt, and not as a judgment.

The Commissioner of Internal Revenue, in sanctioning the institution of the suit, elected to surrender all authority over the assessment, and the result was a complete withdrawal from him and the collector of all jurisdiction of the subject-matter and the person.

If the Court had rendered judgment in favor of the Government, this would have merged the assessment in the judgment, and its collection would have been made by the marshal and not by the collector. The judgment having been rendered in favor of Harding, operated as a complete extinguishment of the assessment, no matter upon what ground the judgment was based. If this were not so, then the collector could now proceed against him upon the assessment—an absurd supposition. In either event, therefore, the judgment of the Court would wipe out the assessment as an assessment. And this was the very legal result the Government sought to attain in bringing its suit.

Having submitted its claims under the assessment to the jurisdiction of the Court, it thereby surrendered all right to enforce those claims through its taxing officials. The bringing of its suit was virtually a prohibition to all its officers from proceeding any further in the matter. The defendant

then acted utterly without authority in making the seizure. Is there any doubt that but for the statute forbidding such action he could and would have been enjoined or restrained from selling the property seized?

The cases which hold ministerial officers protected from suit proceed upon the ground that they are acting under warrants issued to them by assessors, and they have only to look to the validity of such warrants. But revenue collectors do not receive warrants directing them to act; their authority is derived from the assessment lists certified to them by the Commissioner of Internal Revenue. Under Revised Statutes, 3213, it is made the duty of collectors to bring suits in the name of the United States for the collection of taxes, with the sanction of the Commissioner.

The suit of the Government against Harding was, therefore, brought at defendant's instance, and he had complete knowledge of all matters involved therein. He had official notice, then, that all jurisdiction of the subject-matter of the assessment had been withdrawn from the revenue officers and transferred to the Circuit Court. In other words, he knew that all authority to act under the assessment had been taken from him. There is a conflict in the authorities as to whether a Sheriff, acting under an execution regular and valid on its face, is affected by notice of defects in the judgment.

In *Conner* v. *Long*, 104 U. S., 228, a Sheriff in New York had levied an attachment on goods and sold them. There were proceedings in bankruptcy in the United States Court in Massachusetts, which, under the statute, rendered the attachment void. But the Sheriff had no knowledge of the pendency of that suit. He was sued by the assignee in bankruptcy to recover the value of the goods sold. It was held that the Sheriff was protected because he had no knowledge of the bankruptcy proceedings. Of course, if he had had such knowledge, he would have been liable.

When the Commissioner of Internal Revenue, at defendant's instance, authorized the bringing of the suit in the name of the United States against Harding, he virtually directed the defendant not to enforce the assessment by distraint. The defendant, then, was in the position of a Sheriff with an execution which the Court has ordered to be returned without levy.

It is said that the plaintiff should have paid the tax, and sued the collector to recover it back.

Now, what is the purpose of the statute requiring such payment before suit to recover back? It is simply to afford the tax-payer a remedy to test the question of his liability on the assessment. In a suit against the collector after payment of the tax, the matter at issue would be the tax-payer's liability upon the assessment; and this is the pre-

cise question which was at issue in the suit of the United States against Harding. In bringing that suit the Government distinctly waived its right to exact payment of the tax as a condition precedent to testing the validity of the assessment. Had the plaintiff paid the tax, and then brought suit, the collector could, and certainly would, have pleaded the pendency of the former suit, and thus had the action against him dismissed. Had the plaintiff paid the tax, and awaited the termination of the former suit, he incurred the risk of being barred by the statute of limitations in his suit against the collector. The payment of the tax would have been a useless formality, and, indeed, it is doubtful whether, under the circumstances, the Government had the right even to receive such payment. In *Hills* v. *Exchange Bank*, 105 U. S., 319, it is said:

> It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted.

And so, we say that a tender of performance by payment of the tax is waived when such tender or payment would have been utterly useless. The plaintiff honestly tried to do all he could to secure his rights, by taking an appeal to the Commissioner, which was disallowed. He could do no more.

This Court has always carefully guarded the

rights of tax-payers in holding that when the Government elects to enforce its claim for taxes in any form of proceeding, the judgment is conclusive in any other action, whatever the character of such suits, whether indictment, information for forfeiture, or civil suit.

United States v. Choteau, 102 U. S., 603.
United States v. Ulrici, 111 U. S., 38.
Coffey v. United States, 116 U. S., 436.

*SECOND.*

THE PLAINTIFF WAS CERTAINLY ENTITLED TO RECOVER THE AMOUNTS FOR WHICH THE PROPERTY WAS SOLD.

The plaintiff appealed to the Commissioner for an abatement of the assessment, and his appeal was disallowed. His property was sold and the proceeds paid into the treasury. In order to recover back these amounts, it is necessary for him to show that they were "wrongfully collected." To establish this position he must show that he did not owe the tax assessed against him. This is conclusively proved by the judgment for him in the suit of the Government on the assessment. This suit against the collector being really a suit against the Government, as shown above, the defendant is bound by the judgment in the Government's case.

Moreover, the defendant moved "to strike out of the first count of the declaration all of that part of the first count which refers to a suit of the United States against John H. Harding in the District Court," which motion was overruled. (*Page* 18.) The demurrers also reached back and brought in question the sufficiency of the declaration. (*Page* 18.) There was, then, a judicial determination that the declaration was good in law to sustain plaintiff's case. He proved the facts set out in the declaration, and was entitled to judgment.

The case of *Stoll* v. *Pepper*, 97 U. S., 438, determines that plaintiff is entitled to a judgment at least for the amount realized from the sale of the property.

It will be seen from the pleadings, in so far as they are evidence of the facts therein set out, and from the proof, that this plaintiff has had a hard experience in the matter of this claim for taxes. His property was seized for violation of law, and upon trial of the information it was dismissed; he was indicted for the same offense and acquitted; he has been sued for the same tax upon his bond, and judgment rendered in his favor; and, finally, his property has been seized by the defendant and sold. There is no evidence that the Government has ever filed a bill to enforce its lien for this tax; but, with this exception, it has used every instrumentality known to the law to compel payment, and in

every contest in the Courts the plaintiff has been successful.

Surely he is at least entitled to get back the money "wrongfully collected" and paid into the treasury.

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*Attorneys for Plaintiff in Error.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1890.

JOHN H. HARDING, PLAINTIFF IN ERROR,
*vs.*
W. M. WOODCOCK.
} No. 29.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.*

## BRIEF FOR DEFENDANT IN ERROR.

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## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT OF THE CASE.

The declaration of Harding, who was the plaintiff below, contained three counts. The averments of the first count make out the following case:

Harding was a distiller in Robertson County, Tenn. Woodcock was the internal-revenue collector of his district. In July, 1881, an assessment was made against Harding for the tax on whisky which he was supposed

to have produced and not stamped. He applied to the Commissioner of Internal Revenue to have the assessment set aside, but the appeal was disallowed. On January 3, 1882, Woodcock, as collector, seized 593 gallons of whisky, of the value of $5,000, to satisfy the taxes due under the assessment. Harding protested against the seizure on the ground that he did not owe the taxes and that the assessment was illegal; but in spite of the protest Woodcock took the whisky and sold it to pay the taxes. In March, 1882, the United States brought suit against Harding and his sureties on his bond as distiller to recover the taxes due under the assessment. The issue raised on this action was as to the legality of the tax. Before judgment was had Woodcock, as collector, on the 2d of June, 1882, seized the distillery machinery of Harding, 234 gallons of whisky, and the distillery premises, to make further payment on the taxes due under the assessment. Harding again protested against the seizure, but the property was sold for taxes, "whereby plaintiff was deprived of the use, control, and ownership of the said property to the great damage of the plaintiff." On November 13, 1883, a verdict and judgment was rendered againt the United States in its action against the plaintiff and the sureties on his distiller's bond, thereby conclusively determining the illegality of the assessment.

The second count in plaintiff's declaration was for conversion of the goods and chattels, and the third was for trespass on the distillery premises.

Defendant filed five pleas. The first was "not guilty" to the whole declaration. The second plea was to the

first and second counts, and was that plaintiff had purchased the articles seized at collector's sale, had paid nothing for them, and had suffered no damage. The third was aplea to the three counts and was a justification on the ground that as collector the defendant had a right to enter on distillery premises. The fourth plea was a justification to the whole declaration, by the averment that all of defendant's acts complained of were done under the assessment duly made and certified to him by the Commissioner of Internal-Revenue, who directed him to collect the same by distraint. The fifth plea is not material, because it was held bad on demurrer.

The replication to the fourth plea was that the assessment had been found illegal and void in the suit between the United States and the plaintiff, whereby defendant was concluded.

The court held that the demurrer of defendant to this replication reached back to the fourth plea; that this was bad, and should be stricken out.

Trial was had on the issue of "not guilty," and on a traverse of the second and third pleas.

The evidence made out exactly the case stated in the first count of the declaration, with the additional circumstance that the two sales by the collector together brought $99.40, and that the property sold was worth from $1,500 to $5,000.

The court directed the jury that the assessment was a complete protection to the collector, and that a verdict should be brought in for the defendant, which was accordingly done.

## ARGUMENT.

### I

*The preliminary question of pleading.*

It must be and it is conceded by counsel for the plaintiff in error, that an assessment in the hands of a collector, issued to him by the Commissioner of Internal Revenue, is a complete defense to him against an action for trespass for distraining the property of the person against whom the assessment is made to collect it. (*Erskine* vs. *Hohnbach*, 14 Wall., 613.)

The first count in the declaration was, therefore, demurrable and bad, because it showed defendant's justification on its face. Defendant's fourth plea was good against all the counts for the same reason. The court erred in striking this plea out on demurrer. The error was two-fold. First, in holding the plea to be bad; and second, in holding that the demurrer to the replication searched the record. (*Hobbs* v. *Railroad*, 12 Heiskell, 526.) The proof completely sustained the averments of the first count of the declaration, and none other. The court properly directed the jury that no recovery could be had on such evidence against the defendant. The previous errors of the court did not make it impossible or improper for it to correct them by a proper direction to the jury on the evidence. If a verdict for plaintiff had been rendered on this evidence there must have been a judgment *non obstante veredicto* for the defendant on the insufficiency of the declaration and the evidence. It is not apparent, therefore, how the earlier errors of the circuit court in favor of the plaintiff can

now entitle him to complain that the court finally took the right view in charging the jury.

The court was obliged to consider defendant's justification and the evidence sustaining it in charging the jury, because the averments of the declaration made out such justification.

## II.

*The action on Harding's bond as distiller, to recover the taxes, did not affect the right or duty of the collector to distrain.*

The claim of the plaintiffs in error that the collector's right to distrain for the taxes was suspended by the action on the distiller's bond can not be sustained. The power to distrain and sell is conferred by sections 3187, 3188, 3196, and 3197, Revised Statutes.

The right of the United States to sue on the distiller's bond existed without section 3213, Revised Statutes. Section 3213 confers the right to sue for taxes without regard to any promise on the part of the taxpayer to pay. The action on the distiller's bond is an action on an express contract to pay. The distiller's bond is taken by the Government as an additional security for the performance by the distiller of all the requirements of law, among which is the requirement to pay the taxes assessed. (Sec. 3260, Rev. Stat.) There is nothing in the statute which makes the suit for taxes exclusive of any other remedy for their recovery, and there is no provision of the statute which makes an action on a distiller's bond exclusive of any other mode of enforcing his compliance with the law. As the distiller's bond is

a cumulative security given to the Government for the compliance by the distiller with the requirements of law, it is not to be inferred that when it comes to be used as a remedy it is to exclude every other.

The policy of the internal-revenue law, manifest in every section of it, is to give to the Government every remedy that could be devised by the wit of man to secure the payment of the tax. In view of such a policy, can it be implied that the pursuit of one remedy excludes every other?

The sureties on the bond of the collector might very well claim that it would be inequitable in the Government to stay its right to collect by distraint in order to enable it to collect from the sureties the taxes due. At any rate, it does not lie in the mouth of the defendant to object to a remedy against him which would save his sureties because of the pendency of an action against him and his sureties.

Again, by section 3218, Revised Statutes, every collectoris charged with the whole amount of taxes contained in the lists transmitted to him by the Commissioner of Internal Revenue, just as he is charged with the stamps which are sent to him for sale. These list-taxes remain a charge against him until they are found to be uncollectable, and until it shall be proven to the satisfaction of the Commissioner of Internal Revenue that due diligence has been used by him as collector. For his own protection, therefore, the collector must levy a distraint whenever the property of the tax-payer is visible. Otherwise he would not be duly diligent.

The policy of the internal-revenue law, with respect to staying the collection of taxes, is made sufficiently clear

by section 2224, in which suits to restrain the collection of any tax in any court are prohibited. While this of course refers to suits against the United States, it is manifest that it indicates a general policy which would not bind the Government down to an election of remedies for the collection of the tax. The language of Mr. Justice Bradley in *Clinkenbeard* vs. *United States* (21 Wall., 70), is relied on to show that after bringing a suit for taxes the right of the Government to distrain is suspended.

The language is as follows:

> It is undoubtedly true that the decisions of an assessor or board of assessors, like those of all other administrative commissioners, are of a quasi-judicial character, and can not be questioned collaterally when made within the scope of their jurisdiction. But if they assess persons, property, or operations not taxable, such assessment is illegal and can not form the basis of an action at law for the collection of the tax, however efficacious it may be for the protection of ministerial officers charged with the duty of actual collection by virtue of a regular warrant or authority therefor. When the Government elects to resort to the aid of the courts, it must abide by the legality of the tax. When it follows the statute its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs.

The question in the Clinkenbeard case was whether there might be set up as a defense to a suit by the Government on a distiller's bond for taxes the illegality of the tax unless the distiller had first filed an appeal with the Secretary of the Treasury, as required by the act of

Congress, before a suit could be maintained for the recovery of taxes paid. There was no question in the case as to the right of the Government to pursue the remedies both by suit and by distraint. It is not denied on behalf of the United States that after a judgment of the court has been rendered holding the tax illegal that the life of the assessment ceases, and that a collector with notice of such judgment would not be protected by the assessment in a distraint. But in the case at bar there was no judgment at the time of the distraint, and there was no presumption that the tax was to be declared illegal. The election of the Government to abide by the legality of the tax was an election to abide by the legality of the tax in the recovery by suit, but it was not an election of the suit as sole remedy pending the suit.

III.

*Plaintiff below was not entitled to recover the amounts for which the distrained property sold, and which were applied as credits on the taxes due under the assessment.*

The declaration contained a count for trespass of goods, for conversion of them, and for trespass *quare clausum fregit*. The recovery of taxes from a person who has wrongfully collected them is an action in assumpsit. (*City of Philadelphia* vs. *The Collector*, 5 Wall., 720, 731; *Shaw* vs. *Becket*, 7 Cushing, 442). In such an action the tort is waived, and the suit is on an implied promise to repay. If these sums, amounting together to about $100, for which all the property distrained sold, are to be recovered from the collector, they are to be recovered as taxes wrongfully collected.

In the cases of *Hathay* v. *Mason*, 15 Wall., 671, and *Erskine* vs. *Hohnbach*, 14 Wall., 613, it was decided that a collector of internal revenue can not be sued in trespass for the distraint of taxes assessed in an assessment list duly certified to him by the Commissioner of Internal Revenue. For the same reason he can not be sued in trover. The plaintiff below did sue in trespass and in trover. His right to recover in assumpsit depends on his waiving the tort. In trespass and in trover, he relies on the tort. The case of *Stoll* v. *Pepper*, (97 U. S., 438) is not an authority in support of the contention that an action for trespass for illegal distraint may be turned into an action in assumpsit for the recovery of taxes illegally collected.

It does not appear in that case what the original form of action was. The court does not consider the question as between the two forms of action, and it may be presumed therefore that the declaration was framed in assumpsit.

It is respectfully submitted that the petition in error should be dismissed.

WM. H. TAFT,
*Solicitor-General.*